

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ROBERT SMITH, et ux,

Plaintiffs,

v.

NO. 1:98CV249-S-D

UNITED STATES OF AMERICA,

Defendant.

OPINION

This cause was originally filed in the Circuit Court of Clay County, Mississippi, charging Trina V. Hamlin with negligence after she collided with the rear of plaintiff Martha J. Smith's vehicle. Subsequently, the United States Attorney for the Northern District of Mississippi certified, pursuant to the Westfall Act, that at the time of the accident, Hamlin was acting within the course and scope of her employment as a rural mail carrier for the United States Postal Service. This scope of employment certification resulted in the substitution of the United States of America as the defendant and the removal of this action to this court.

Presently before the court is defendant's motion to dismiss for failure to exhaust administrative remedies under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2672-2680. In response, plaintiffs challenge the certification, the applicability of the FTCA where the alleged employee has private liability insurance, and the appropriateness of treating a "United States Postal Service employee operating a vehicle covered by private insurance...as the same entity as the United States."

When a federal employee is sued for a wrongful or negligent act, the Federal Employees

Liability Reform and Tort Compensation Act of 1988 (the “Westfall Act”) empowers the United States Attorney General, through the appropriate United States Attorney, to certify that the employee “was acting within the scope of [her]...employment at the time of the incident out of which the claim arose.” *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419 (1995) (quoting 28 U.S.C. § 2679(d)(1)). Where the action is brought in state court and scope of employment is certified, the action is removed, the employee is dismissed from the suit, and the United States is substituted as the defendant. *Id.*; see *Garcia v. United States*, 88 F.3d 318, 322 (5th Cir. 1996). The case then proceeds under the FTCA, which

provides a remedy for persons injured by an employee of the Government who was “acting within the course and scope of [her]...employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

Palmer v. Flaggman, 93 F.3d 196, 199 (5th Cir. 1996); see also *Lamagno*, 515 U.S. at 426 (purpose of Westfall Act is to protect federal employees from personal liability for common law torts committed within scope of their employment). “Generally, such cases unfold much as cases do against other employers who concede respondeat superior liability.” *Lamagno*, 515 U.S. at 419.

“Ordinarily, scope-of-employment certifications occasion no contest.” *Id.* at 421. However, when they do, they are clearly reviewable by the court. *Rodriguez v. Sarabyn*, 129 F.3d 760, 764 (5th Cir. 1997). When a plaintiff raises a certification challenge, the “burden of proof lies with him to show that the...initial decision was incorrect.” *Palmer*, 93 F.3d at 198. To determine whether Hamlin was a federal employee or an independent contractor, the court applies federal law. *Rodriguez*, 129 F.3d at 765. The “critical factor” in distinguishing an independent contractor from an employee is the power of the federal government “to control the detailed physical performance of the contractor.” *Id.* The issue of control is not, however, the only factor which the court

examines. *Id.* Others include:

(1) whether the work requires a person who is highly educated or skilled; (2) whether the work is typically performed by an employee in the locale or by an independent contractor; (3) whether the employer supplies the tools, instrumentalities, or place of work; (4) whether the employment is for a considerable period of time with regular hours; (5) whether payment is by the hour or month; (6) whether the work is full-time employment by one employer; (7) whether the work is part of the employer's regular business; and (8) whether the parties believe they have created an employment relationship.

Id. If the court determines that Hamlin was a federal employee at the time of the accident, it must then examine whether she was acting within the course and scope of her employment as defined by Mississippi law. *Palmer*, 93 F.3d at 198. Even if the court rejects certification, "the action must remain in district court," *Garcia*, 88 F.3d at 324, as certification by the Attorney General presents an "initial colorable federal question." *Id.*

In this case, the court cannot proceed to the exhaustion issue until it resolves the certification question. It is clear from this court's reading of the applicable statutes and case law that if Hamlin was an employee of the Postal Service at the time of the accident and she was acting within the course and scope of that employment, then certification was appropriate. In that situation, Hamlin is protected from personal liability by the FTCA, regardless of her private liability insurance, and the issue of exhaustion is crucial. If, however, Hamlin was an independent contractor or was not acting within the course and scope of her postal employment, then certification was improper. In that situation, the FTCA would provide Hamlin no protection, and exhaustion would be unnecessary. Towards that end, a limited amount of discovery and an evidentiary hearing are in order.

An appropriate order shall issue.

This _____ day of May, 1999.

SENIOR JUDGE